Supreme Court, U.S.
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No. 01-1567

IN THE

Supreme Court of the United States

CHERYL HILL,

Petitioner,

v.

FORT BEND INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

DAVID M. FELDMAN *
Coastal Banc Plaza
5718 Westheimer, Suite 1200
Houston, Texas 77057
(713) 960-6000

* Counsel of Record

Attorney for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the decision of the Fifth Circuit is inconsistent with the decisions of any other circuits or this Court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
SUMMARY OF THE REASONS FOR DENYING THE WRIT OF CERTIORARI	3
REASONS FOR DENYING THE WRIT	4
I. THE DECISION OF THE FIFTH CIRCUIT IS NOT INCONSISTENT WITH THE DECISIONS OF ANY OTHER CIRCUITS OR THIS COURT	4
A. The Fifth Circuit Applied the Correct Summary Judgment Standard	4
B. The Fifth Circuit Properly Determined That the Continuing Violation Doctrine Does Not Apply to Hill's Discrimination Claims	4
C. The Fifth Circuit Properly Dismissed Hill's Claims of Age and Race Discrimination	7
D. The Fifth Circuit Properly Dismissed Hill's Claim of Hostile Work Environment	8
E. The Fifth Circuit Properly Dismissed Hill's Claim of Retaliation	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

United States Supreme Court

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 8

McDonnel Douglas v. Green, 411 U.S. 792 (1973) 7

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 8

Ninth Circuit

Anderson v. Reno, 190 F.3d 930 (9th Cir. *1999*) ... 5

Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998) 5, 6

Fiedler v. UAL Corp., 218 F.3d 973 (9th Cir. 2000) 5, 6

Morgan v. National Railroad Passenger Corp., 232 F.3d 1008 (9th Cir. 2000) 5, 6

Fifth Circuit

Evans v. City of Houston, 246 F.3d 344 (5th Cir. 2001) 9

Fierros v. Texas Dept. of Health, 274 F.3d 187 (5th Cir. 2001) 7

Huckabay v. Moore, 142 F.3d 233 (5th Cir. 1998) 5

Jack v. Texaco Research Ctr., 743 F.2d 1129 (5th Cir. 1984) 9

Long v. Eastfield College, 88 F.3d 300 (5th Cir. 1996) 9

Portis v. First National Bank of New Albany, 34 F.3d 325 (5th Cir. 1994) 7

Vance v. Union Planters Corp., 209 F.3d 438 (5th Cir. 2000) 7

Waltman v. Int'l Paper Co., 875 F.2d 468 (5th Cir. 1989) 5

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OPINIONS BELOW

The District Court's February 20, 2002, Order granting Respondent's Motion for Summary Judgment is set out in the Petition for Writ of Certiorari at Appendix B. The September 26, 2002, opinion of the Fifth Circuit affirming the District Court's grant of summary judgment, as well as the October 31, 2001, Order of the Circuit Court denying Petitioner's Petition for Rehearing En Banc, are set out in the Petition for Writ of Certiorari at Appendix A and C, respectively.

STATEMENT OF THE CASE

This Statement of the Case is included, as allowed by the Rules of the Supreme Court, because Respondent is dissatisfied with the "facts" as described by the Petitioner. *See* Sup. Ct. R. 24 2. Petitioner's Statement consists of little more than her unsubstantiated allegations and subjective beliefs.

Petitioner Hill, a Black female born in 1947, has worked as a teacher since 1970 and received a mid-management administrator certificate from the Texas Education Agency in 1987. (Vol. 2, Doc. 52, pp. 567-77). In 1989 Hill accepted a teaching position with the Respondent, Fort Bend Independent School District ("FBISD"). (Vol. 2, Doc. 52, p. 573). In 1994 she began teaching English as a Second Language ("ESL") at Townewest Elementary School in FBISD. (Vol. 2, Doc. 52, p. 572).

On April 5, 1999 Hill filed her initial charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that FBISD had been denying her promotions since 1988, because of her race and age.[1] (Vol. 2, Doc. 52, p. 496). Hill alleged specifically, that on November 20, 1998 she was denied an ESL Coordinator position and on January 25, 1999, a summer school assistant principal appointment on account of her race and/or age. (*Id.*).

On December 7, 1999 Hill filed the instant lawsuit against FBISD based on her initial charge. (Vol. 3, Doc. 1). On March 23, 2000, Hill filed a second EEOC charge, alleging she was retaliated against for filing her April 5, 1999 charge. (Vol. 2, Doc. 52, p. 471). These new allegations were incorporated in a Second Amended Complaint filed on March 31, 2000. (Vol. 3, Doc. 16). The second EEOC charge was also amended on May 8, 2000. (Vol. 2, doc. 52, p. 469). On May 12, 2000, Plaintiff filed a *second* Second Amended Complaint. (Vol. 3, Doc. 27).

In her suit, Hill alleges, generally, that since 1988, FBISD has denied her promotions to at least twenty administrative positions because of her race and/or age. (Vol. 3, Doc. 27, p. 245). Specifically, she contends she was not promoted into

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[1] Appellant allegedly began applying for administrative positions within FBISD one year before FBISD hired her as a teacher. (Vol. 2, Doc. 52, p. 574).

the following positions: (1) Assistant Principal, regular term; (2) Assistant Principal, summer school; (3) ESL Coordinator; (4) Title I Supervisor; (5) Dean of Instruction; and (6) Reading Specialist.[2] (Vol. 3, Doc. 27, p. 245). Hill failed to articulate the date she applied for these positions or if she applied for them on more than one occasion. (*Id.*).

Hill has not alleged that she was ever denied an opportunity to apply for an administrative position within FBISD or that she was treated differently than any other applicant during the selection process. (Vol. 3, Doc. 27). Like most applicants, Hill met the basic job requirements set forth in the job postings and it is uncontroverted that she was interviewed for numerous positions for which she applied. (Vol. 3, Doc. 27, pp. 541, 548, 551, 553, 556-57, 558, 560, 563, 564). However, she and many other individuals were eliminated because they were not the most qualified candidates for the positions. (Vol. 2, Doc. 52, pp. 485-87, 489-91). The summary judgment evidence, as discussed by the courts below, showed that the persons selected, for the promotions Hill complains of not receiving, were a widely diverse group, cutting across lines of race, national origin, and age. (Pet. App. A 6a, B 15-17a). The courts below properly concluded that the evidence supported a summary judgment decision in favor of the District.

SUMMARY OF THE REASONS FOR DENYING THE WRIT OF CERTIORARI

This suit presents nothing more than a routine employment discrimination case that is only made distinctive by virtue of the fact that Petitioner represents herself *pro se* and her briefing and arguments are difficult to decipher. Petitioner's

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[2] Hill admits that Reading Specialists are not administrative positions and successful candidates do not receive an increase in pay. (Vol. 2, Doc. 52, pp. 513, 540 and 555).

arguments are largely borne of the fact that she is unfamiliar with the law. The only reason she articulates for granting review, with any amount of clarity, is her reference to conflict between the courts as embodied in Rule 10. This Brief in Opposition will clarify that the cited authorities are consistent with the Fifth Circuit's decision in this case and no reason for granting review exists.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FIFTH CIRCUIT IS NOT INCONSISTENT WITH THE DECISIONS OF ANY OTHER CIRCUITS OR THIS COURT

A. The Fifth Circuit Applied the Correct Summary Judgment Standard.

Petitioner erroneously asserts that the Fifth Circuit ignored the limitations on its jurisdiction by improperly weighing the evidence as to each of her claims. Applying proper standards, the Fifth Circuit did not impermissibly weigh the evidence. It merely noted that where Hill offered evidence, it did not contradict with that offered by FBISD and did not create a reasonable inference in her favor. (Pet. App. 7-8a, B 40a). In other instances, the circuit court noted that Hill failed to produce any evidence on certain elements of her claims on which she had the burden of proof. (Pet. App. 8a, B 40a). In fact, in deference to Hill's *pro se* status, the court considered any evidence where the deficiencies in the admissibility of the evidence could be cured. (Pet. App. B 24a).

B. The Fifth Circuit Properly Determined That the Continuing Violation Doctrine Does Not Apply to Hill's Discrimination Claims.

The Fifth Circuit properly dismissed Hill's allegations of discrimination occurring more than 300 days before she filed her charges of discrimination. 42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d)(2). Hill incorrectly argues that the Fifth

Circuit erred when it concluded that her failure to promote claims pre-dating June 10, 1998 and her retaliation claims arising prior to May 30, 1999 are time-barred. In an effort to avoid the mandatory timelines set forth in the statute, Hill contends her failure to promote claims, extending back to 1988, constitute a continuing violation, citing *Anderson v. Reno*, 190 F.3d 930 (9th Cir. 1999) and *Fiedler v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000). Appellant grossly misinterprets this equitable exception to the 300-day rule. Although Hill now relies on Ninth Circuit precedent, her claims are still time-barred because the decisions of the Fifth and Ninth Circuits are consistent in this area.

According to the Fifth Circuit, a continuing violation occurs "where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989) (quoting *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 532 (5th Cir. 1986). It requires an "organized scheme leading to and including a present violation such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, which gives rise to the action." *Huckabay v. Moore*, 142 F.3d 233, 239 (5th Cir. 1998).

Petitioner asserts that the Fifth Circuit's decision concerning application of the continuing violation doctrine is inconsistent with the following Ninth Circuit opinions: *Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000); *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000); and *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104 (9th Cir. 1998). (P. Br. p.16). Each of these opinions is easily distinguished from the present case.

In *Morgan*, a black employee brought a Title VII action against his employer based on multiple acts of alleged discriminatory conduct including discipline, counseling, and failures to promote. 232 F.3d at 1016. The court clearly held

that a series of denied promotions would not, in and of themselves, support an application of the continuing violation doctrine. *See id.* The court also determined though, that numerous alleged acts of discrimination coupled with "abundant evidence from other employees and management regarding the racially discriminatory atmosphere" created a relationship between untimely acts and timely ones. *Id.* The court also noted that a consistent pattern of acts perpetrated by the same managers demonstrated that the acts were not discrete or isolated. *Id.*

In contrast to *Morgan*, Hill offers only conclusory statements and subjective beliefs to support her claims. There is no evidence that she was subjected to any racial or age related remarks. The record is devoid of any evidence of a racially charged atmosphere. Additionally, unlike the decision-makers in *Morgan*, Hill offers no evidence that the same individuals were involved in the various promotional decisions.

Fielder and *Draper* are distinguishable from the present case as well. Both *Fielder* and *Draper* involved claims of sexual harassment premised on a hostile work environment theory and included no claim of a failure to promote. *Fielder*, at 976-77; *Draper*, at 1105. As the Ninth Circuit noted in *Draper*, harassment claims are often the result of "a cumulative process rather than a one-time event." 147 F.3d at 1108 (quoting *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1166 (7th Cir. 1966)). Moreover, the plaintiffs in these cases successfully established a material question of fact as to their claims of discrimination regardless of the limitations period. *Fielder*, at 985; *Draper*, at 1108. Unlike Hill, they also established that a material question of fact existed as to whether the hostile environment continued into the 300-day limitations period. *Fielder,* at 988; *Draper*, at 1108.

C. The Fifth Circuit Properly Dismissed Hill's Claims of Race and Age Discrimination.

Hill argues that the Fifth Circuit improperly applied this Court's holdings concerning the analysis of Title VII cases. Specifically, she alleges the circuit court failed to recognize information she presented as direct evidence and, therefore, somehow wrongly applied the *McDonnell Douglas* framework. (Pet. Br. 14).

The Fifth Circuit employed the correct legal analysis to determine that FBISD was entitled to summary judgment on Hill's claims of age and race discrimination. (Pet. App. A 4a). First, the Fifth Circuit correctly applied the burden-shifting test established in *McDonnel Douglas v. Green*, 411 U.S. 792, 802-04 (1973). (Pet. App. A 4a). Second, the Fifth Circuit properly found that FBISD met its burden of producing evidence of a legitimate nondiscriminatory reason for failing to promote Hill. (Pet. App. A 5a). Third, the Fifth Circuit properly found Hill failed to produce sufficient probative evidence to raise a material question of fact concerning her contention that FBISD's nondiscriminatory explanation for Hill's inability to promote was merely a pretext. (Pet. App. A 5-7a).

The cases relied on by Hill are distinguishable from the instant case because they, in fact, included direct evidence of discrimination: *Fierros v. Texas Dept. of Health*, 274 F.3d 187, 195 (5th Cir. 2001)(recognizing plaintiff's affidavit constituted direct evidence because it alleged that her supervisor told her she had been denied a pay increase because she filed a discrimination complaint against him); *Vance v. Union Planters Corp.*, 209 F.3d 438, 442 (5th Cir. 2000)(finding evidence that supervisor's comments that he preferred a "mature man" for the position was discriminatory on its face); *Portis v. First National Bank of New Albany*, 34 F.3d 325, 328 (5th Cir. 1994)(stating that plaintiff's testimony regarding statements made by her supervisor

indicating his intent to discriminate against her because of her sex was direct evidence); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)(finding that plaintiffs introduced direct evidence that transfer procedures put in place by the employer discriminated against persons based on age).

D. The Fifth Circuit Properly Dismissed Hill's Claim of Hostile Work Environment.

Contrary to Hill's assertions, The Fifth Circuit applied the proper legal analysis in determining that Hill's claim of a hostile work environment could not survive summary judgment. To prevail on a hostile work environment claim, a plaintiff is required to demonstrate that a reasonable person would consider the environment hostile or abusive, such that it effectively alters the conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

The Fifth Circuit found that Hiil's allegations did not, as a matter of law, constitute severe or pervasive conditions sufficient to support a charge of hostile work environment. (Pet. App. A 8a). The courts below properly determined that complaints of constant requests for schedules, questions concerning the program she was teaching, and unsubstantiated allegations of general harassment do not rise to the level of a hostile work environment. *Id.* The totality of these complaints reveal only that Hill disagreed with her supervisors over how specific assigned duties should be performed. *Id.*

E. The Fifth Circuit Properly Dismissed Hill's Claim of Retaliation.

Contrary to Hill's contention, the Fifth Circuit correctly determined that her claims based on alleged retaliation that occurred prior to May 30, 1999 (i.e., more than 300 days prior to the filing of her retaliation charge) are time-barred. (*See* discussion at paragraph I.B., *supra*). Additionally, the

Fifth Circuit properly found no causation supporting her claim of retaliation.

In order to establish causation as to her timely claims, Hill must demonstrate that her opposition to the alleged unlawful activity was, at a minimum, a motivating factor in the action taken by the employer. *See Long v. Eastfield College,* 88 F.3d 300, 304-05 (5th Cir. 1996); *Jack v. Texaco Research Ctr.,* 743 F.2d 1129, 1131 (5th Cir. 1984). After FBISD explained its nondiscriminatory reason for failing to promote Hill, the burden shifted to her to establish that her protected activity was a motivating factor behind FBISD's decision not to promote her. *See Evans v. City of Houston*, 246 F.3d 344 (5th Cir. 2001). The Fifth Circuit determined that Hill failed to satisfy her burden. (Pet. App. A 8a). She offered no evidence that the alleged retaliatory acts would not have occurred but for her protected activity. *Id.*

Even if these decisions are inconsistent, which they are not, it would still not be a basis for this Court's review. In fact, however, they are entirely consistent. In *Evans*, summary judgment was reversed because the district court erroneously applied the "but for" test at the prima facie stage; here it was correctly applied following a review of the school district's articulated reason for adverse action. 246 F.3d at 354. Similarly in *Long*, the plaintiff offered specific evidence to show pretext; here, Hill did nothing more than disagree with FBISD's explanation while accusing the court of ignoring her evidence. (*See* Pet. Br. 14).

CONCLUSION

For the above reasons, the Court should deny the Petition for Writ of Certiorari.[3]

Respectfully submitted,

DAVID M. FELDMAN *
Coastal Banc Plaza
5718 Westheimer, Suite 1200
Houston, Texas 77057
(713) 960-6000

* Counsel of Record

Attorney for Respondent

[3] Hill makes other arguments attacking the decision of the courts below, but none even remotely rise to a level suggesting Supreme Court review. By way of example, throughout her Petition, Hill contends that the district court and court of appeals found that her case was frivolous when what actually occurred was merely an award of court costs pursuant to Fed. R. Civ. P. 54(d).